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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 04 217 50847 Office: NEBRASKA SERVICE CENTER Date: JUL 13 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:
[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineering recruiting company. It seeks to employ the beneficiary permanently in the United States as a systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a Master's degree in the required field.

On appeal, counsel focuses on the requirements for the classification. For the reasons discussed below, we find that the petitioner has not overcome the director's valid basis for denial.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a Master of Science degree in Physics. As such, the beneficiary is an advanced degree professional. Thus, the issue is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts. *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983) provides:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). **Id. at 423.** The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Id. at 1012-1013. Relying in part on this decision, *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983) provides:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

Id. at 1008. The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS,* 746 F.2d 503, 504 (1984).

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** **Do not duplicate the time requirements. For example, time required in** training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: College Degree Required: Masters
Major Field of Study: Computer Science

Experience: None

Block 15: None

Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The petitioner submitted the beneficiary's transcript from the University of Victoria. The transcript is divided into two sections by the title "Academic Record in the Faculty of Graduate Studies." Below this line are the beneficiary's physics courses and thesis, all level 500 and higher. Above the line are listed six computer science courses, four of which the beneficiary competed. All of the courses are level 370 or below. The Winter 95-96 session is entitled "Special Non-Degree – Arts & Science Non-Degree." None of these courses are designated as a thesis or project. In one course, the beneficiary received a grade of C+.

The petitioner also submitted an evaluation from the Trustforte Corporation concluding that the beneficiary's Master of Science from the University of Victoria was equivalent to a "Master of Science Degree in Physics and Computer Science." In reaching this conclusion, the evaluation states that the beneficiary completed "graduate-level studies and research in Physics and Computer Science."

On June 16, 2005, the director issued a request for additional evidence, noting that the beneficiary had only completed four courses, six units, of computer science coursework at the University of Victoria.

In response, counsel asserts that it is CIS policy to accept credential evaluations from reputable services. The petitioner provides a new, detailed evaluation from [redacted] of the Trustforte Corporation. In his new letter, Mr. [redacted] states that six of the beneficiary's 24 units at the University of Victoria were in computer science. While the beneficiary did not complete the two additional courses, Mr. [redacted] finds it notable that "studies were completed toward the fulfillment of two additional courses in the computer field." He further asserts that while Masters programs are not uniform in the United States, they typically require six units in a particular field of concentration and do not permit "minor" fields of concentration. He concludes:

> At the University of Victoria, [the beneficiary] completed four courses (six units) in the computer field and completed studies toward two additional classes (three additional units) in the computer field. While [the beneficiary] completed more courses in Physics than Computer Science, she nonetheless satisfied the requirements for a major concentration in Computer Science, as well as in Physics. Moreover, since a minor typically is not recognized at the master's-level, the concentrated studies completed by [the beneficiary] in the computer field would not meet the standards for qualification for a concentration in both Computer Science and Physics. Thus, we conclude that [the beneficiary] fulfilled the equivalent of a Master of Science Degree in Physics and Computer Science from an accredited US institution of higher education.

The petitioner also submitted the requirements for a major in Physics. The requirements include three courses with at least one chosen from the core courses, PHYS 500, 502, 505 or 510, "additional courses as required," a thesis and final oral examination. Moreover, grades of C+ or lower are "unsatisfactory for required courses."

The petitioner also submitted materials regarding CIS assessments of what constitutes an advanced degree. As the director never disputed that the beneficiary has an advanced degree, these materials are irrelevant.

The director concluded that the petitioner had not established that the beneficiary had a Master of Science degree in Computer Science. The director found the evaluation, which considered coursework that had not been completed, to be "unorthodox." Most significantly, the director stated that "no effort was made to compare the alien beneficiary's completed computer science coursework against the University's requirements for its computer science master's degree program."

On appeal, counsel continues to focus on what constitutes an advanced degree. As stated above, we do not contest that the beneficiary has an advanced degree. At issue is the field in which the beneficiary obtained her degree. Counsel further asserts that CIS should accept the evaluation from a reputable credential evaluation service. Counsel notes the new letter from the Chair of the University of Victoria's Physics Department asserting that there is no joint degree program between the Physics and Computer Science departments.

Counsel is not persuasive. The lack of a joint degree program does not create the presumption that the beneficiary would qualify for such a joint degree if offered. In addition, CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Most significantly, the petitioner has not responded to the director's concern that the record lacked evidence of the requirements for a Master of Science degree in Computer Science at the University of Victoria. Given the Physics requirements for 500 level or above courses and a thesis, it is reasonable to question whether the beneficiary's 370 level and below courses in computer science were truly graduate level, especially as these courses are separated from the beneficiary's "Academic Record in the Faculty of Graduate Studies" on her transcript.[2] Moreover, as stated above, the Physics Department does not consider C+ grades in required courses and one of the beneficiary's computer science grades was a C+.

[2] The University of Victoria's website, www.csc.uvic.ca/newgrad/program_requirement.html, provides that a Master of Science degree in Computer Science can be completed as a thesis or project option. Both options require 15 units of coursework at the 500 level or higher. The petitioner completed no 500 or higher level classes and did not complete a project or a thesis in computer science.

In light of the above, the petitioner has not established that the beneficiary has the degree specified on the Form ETA-750, a Master's degree in Computer Science. The labor certification does not reflect that any other field, related or otherwise, would be acceptable. Thus, the beneficiary does not meet the job requirements set forth on the labor certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.